No. 89-1572

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE P. DENNISON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's violations of the district court's discovery orders warranted the mid-trial dismissal of the indictment with prejudice.

2. Whether the Double Jeopardy Clause or the government's alleged failure to comply with 18 U.S.C. 3731 required dismissal of the government's appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 891 F.2d 255.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1989. A petition for rehearing was denied on January 9, 1990. Pet. App. C1. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1988, petitioners were indicted in the Eastern District of Oklahoma on charges arising out of their scheme to defraud Phoenix Federal Savings and Loan Association, located in Muskogee, Oklahoma.[1] Dan Stefanoff and petitioners Dana Wilkerson and Thomas Herrmann,[2] acting as the "Denver I-76" partnership, together with petitioner Gene Dennison, successfully induced Phoenix to issue a $3.2 million loan for the purchase of a parcel of land that they had secretly arranged to buy for only $2.15 million. Petitioners and Stefanoff then misrepresented the actual purchase price to Phoenix by orchestrating simultaneous collusive closings and by submitting materially false documents to the bank. Pet. App. B1-B2.

At petitioners' arraignment, the government provided petitioners with a substantial number of documents in compliance with its obligations under Fed. R. Crim. P. 16 and *Brady* v. *Maryland*, 373 U.S. 83 (1963). These documents related principally to the transactions charged in the indictment, and included

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[1] Petitioners were each charged with one count of conspiracy to defraud a savings and loan institution, in violation of 18 U.S.C. 371, one count of bank fraud, in violation of 18 U.S.C. 1344, and one count of wire fraud, in violation of 18 U.S.C. 1343. In addition, each petitioner was charged with three counts of making false statements to a bank, in violation of 18 U.S.C. 1014. Petitioner Herrmann alone faced an additional bank fraud count. Gov't C.A. Br. 1-2 & n.1.

[2] Stefanoff was charged as a co-defendant in the indictment. Before trial, he entered into a plea agreement with the government. In exchange for pleading guilty to certain charges, Stefanoff agreed to testify as a government witness. Pet. App. B2.

FBI 302 reports (reports of interviews conducted by FBI agents) of some 25 witnesses, including Stefanoff. Gov't C.A. Br. 7. The district court also entered "several [pretrial] discovery orders requiring government counsel to make available to defense counsel exculpatory evidence in their possession." Pet. App. B2. Those orders, among other things, required "disclosure * * * of material which may be used to impeach *substantially* the credibility of *key* government witnesses." Gov't C.A. Br. 7-8 (emphasis in original).

2. Trial began on October 3, 1988. Petitioners complained to the district court that the government had withheld certain information tending to impeach Stefanoff and another government witness, Bill Walsh. At the court's direction, the government searched for and provided petitioners with additional FBI 302 reports relating to Stefanoff's and Walsh's involvement in other loan transactions at Phoenix and another Muskogee bank, Victor Federal Savings and Loan Association. Those transactions were not related to the transaction that was the subject of the indictment. Gov't C.A. Br. 11-16.[3]

Petitioners also complained that the government had not given them impeachment material about Stefanoff and Walsh that had been acquired by federal regulatory authorities. Petitioners referred to information uncovered by the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank Board during investigations of lending practices at both Phoenix and Victor. Gov't C.A. Br.

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[3] The record showed that some of the information contained in those FBI 302 reports was the same information contained in other reports previously disclosed to petitioners. Petitioners already knew of other information contained in the tardily disclosed reports. See Gov't C.A. Br. 15-16 & n.4.

16-20. At the district court's direction, the government contacted those agencies and obtained whatever information they had about those banks' lending practices and any loans involving Stefanoff and Walsh. *Id.* at 18-20. The government also made available to petitioners all of Victor's loan files. *Id.* at 22-25.[4]

3. In light of the government's tardy and piecemeal compliance with its discovery obligations, petitioners filed a motion to dismiss the indictment with prejudice. Petitioners filed that motion during the government's case-in-chief, well before the government had intended to rest its case. Pet. App. B2.

On October 12, 1988, the district court granted petitioners' motion and dismissed the indictment with prejudice. Pet. App. A1-A6. Although characterizing the prosecutor as "green as a gourd," *id.* at B2-B3,[5] the court concluded that the government's failure to comply with its discovery obligations had been "wholesale and ongoing" and in "bad faith," *id.* at A4. Since a mistrial "would penalize [petitioners] for being here and being ready to go to trial," the court held that dismissal of the indictment with prejudice was "the only appropriate sanction." *Ibid.*

4. On the government's appeal, the court of appeals reversed and remanded to the district court for reinstatement of the indictment. Pet. App. B1-B11. Petitioners moved to dismiss the appeal on two grounds: the government had not diligently prose-

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[4] Shortly after the trial began, the government also provided petitioners with banking records relating to Victor that the FBI had obtained the previous year from the Federal Home Loan Bank Board. The prosecutor had only recently learned of the existence of those records. Gov't C.A. Br. 20-21.

[5] That remark referred to the fact that the prosecutor was trying his second federal criminal case. Pet. App. B6-B7.

cuted its appeal as required by 18 U.S.C. 3731, and the Double Jeopardy Clause barred further proceedings. The court of appeals rejected petitioners' statutory claim, noting that the government had filed its notice of appeal within 30 days and had filed its brief in a timely manner. The court recognized that the government had "obtained from [the court] two extensions totalling sixty days within which to file its brief." Pet. App. B4. The court, however, was "not prepared to hold that such proves a lack of diligence on the part of the government." *Ibid.* "All things considered," the court concluded, "the matter has been diligently pursued by all concerned in this court." *Ibid.*

Addressing petitioners' constitutional claim, the court of appeals determined that the "prosecutorial misconduct" at issue "was not a calculated move by government counsel to provoke [petitioners] into requesting dismissal." Pet. App. B5. In these circumstances, the Double Jeopardy Clause did not bar the government's appeal. *Ibid.* (citing *United States* v. *Dinitz*, 424 U.S. 600 (1976)).

Turning to the merits of the government's appeal, the court accepted the government's concession that it had not fully and promptly complied with the district court's discovery orders. Nevertheless, the court of appeals determined that "the district court's characterization of the prosecutor's conduct as being the result of 'bad faith' is simply not borne out by the record." Pet. App. B6. Rather, the government's lapses stemmed from the prosecutor's "inexperience * * *, and perhaps carelessness." *Ibid.* The court of appeals also found that petitioners "knew about many, if not all, matters they were attempting to obtain from government counsel," *id.* at B9, and that

"at the moment that the indictment was dismissed, it would appear the government counsel had substantially complied with all discovery orders," *id.* at B9-B10. In other words, petitioners "ha[d] not shown how they would have been prejudiced if required to continue with the trial after receiving the requested materials from the government." *Id.* at B10 n.2.

The court of appeals observed that petitioners did not cite "any Tenth Circuit case where [the court] upheld a district court's dismissal of an indictment because of prosecutorial misconduct." Pet. App. B10. Since "there [was] nothing in the record to indicate bad faith," *id.* at B9, and petitioners had not shown any prejudice from the government's actions, the court of appeals held that the district court "abused its discretion in dismissing the indictment because of the government's failure to comply with discovery orders," *ibid.*

ARGUMENT

1. Petitioners principally contend (Pet. 6-9) that the government's repeated violations of the district court's discovery orders warranted dismissal of the indictment with prejudice. Dismissal of an indictment for prosecutorial misconduct is an extraordinary sanction reserved for extreme circumstances of flagrant government misconduct. See, *e.g.*, *United States* v. *White*, 846 F.2d 678, 693 (11th Cir. 1988); *United States* v. *Wiley*, 794 F.2d 514, 515 (9th Cir. 1986); *United States* v. *Anderson*, 778 F.2d 602, 606 (10th Cir. 1985). Moreover, this Court has made plain that "a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant * * *." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988); see, *e.g.*, *United States* v. *Mechanik*, 475

U.S. 66, 71-72 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 (1983). The proper approach "has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant * * * a fair trial." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981); see, *e.g.*, *United States* v. *McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985).[6]

Here, as the court of appeals correctly determined, the district court abused its discretion in imposing the draconian sanction of dismissal of the indictment with prejudice. The record did not support the district court's conclusion that the government deliberately and in bad faith hid exculpatory information from petitioners. At most, as the court of appeals concluded, the record shows that the prosecutor's inexperience, and perhaps carelessness, accounted for the government's lapses. Moreover, petitioners did not suffer any prejudice from the government's piecemeal discovery disclosures. As the court of appeals recognized, petitioners "knew about many, if not all, matters they were attempting to obtain from government counsel," Pet. App. B9, and "at the moment

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[6] A similar regime limits a court's discretion to impose sanctions for discovery violations under Fed. R. Crim. P. 16(d)(2). In those circumstances, a court must consider such factors as the reason for the violation, the delay in providing the discovery, and the feasibility of curing any prejudice with a continuance. See, *e.g.*, *United States* v. *Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986). And any sanction imposed should be the "least severe sanction that will accomplish . . . prompt and full compliance with the court's discovery orders." *United States* v. *Wicker*, 848 F.2d 1059, 1060 (10th Cir. 1988) (quoting *United States* v. *Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982)).

that the indictment was dismissed, it would appear the government counsel had substantially complied with all discovery orders," *id.* at B9-B10. In these circumstances, a brief continuance—a remedy far less drastic than outright dismissal—plainly would have enabled petitioners to take full advantage of the additional impeachment material disclosed by the government.[7]

2. Petitioners also contend (Pet. 12-15) that since the Double Jeopardy Clause barred further proceedings in the case, the court of appeals should have dismissed the government's appeal. In this case, the district court dismissed the indictment with prejudice in response to petitioners' joint motions for dismissal or a mistrial. As this Court has made clear, when a defendant seeks to end the trial on grounds unrelated to guilt or innocence, the Double Jeopardy Clause does not bar the government from appealing that ruling. *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). The Court, however, has carved out a narrow exception to this rule: "Only where the governmental conduct in question is intended to 'goad' the

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[7] Petitioners suggest in passing (Pet. 10-12) that the decision below conflicts with *United States* v. *Wicker*, *supra*. In that case, the government disclosed the results of certain laboratory tests to the defense several weeks after the district court's discovery deadline; the district court therefore excluded that evidence from the government's case as a sanction under Fed. R. Evid. 16(d)(2). 848 F.2d at 1060. The court of appeals affirmed, holding that the district court properly considered, among other factors, the fact that the "defendants were prejudiced by the government's noncompliance." Id. at 1061. Here, by contrast, the court of appeals determined that the government's tardy disclosure of impeachment material could not have prejudiced petitioners. For that reason, the decision below is consistent with *Wicker*.

defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982); see *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976). Here, as the court of appeals expressly concluded, the "prosecutorial misconduct * * * was not a calculated move by government counsel to provoke defendants into requesting dismissal." Pet. App. B5. Accordingly, the Double Jeopardy Clause would not bar a retrial and therefore did not warrant dismissal of the government's appeal.

Finally, petitioners contend (Pet. 15-17) that the government did not diligently prosecute its appeal as required by 18 U.S.C. 3731. The record shows that the district court dismissed the case on October 12, 1988, and the government filed a notice of appeal on November 10, 1988—within the 30-day period required by Fed. R. App. P. 4(a). On January 20, 1989, the trial transcript was filed in district court, which triggered the setting of a briefing schedule; the court of appeals ordered the government to file its opening brief on March 1, 1989. Thereafter, the court of appeals, on the government's request, granted two extensions of time—ultimately to April 28, 1989—within which to file its brief. The government filed its brief on that date. Pet. App. B3. Since the government complied with the court of appeals' scheduling order, it plainly prosecuted the appeal with the diligence contemplated by 18 U.S.C. 3731.[8]

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[8] Petitioners suggest (Pet. 17) that the government misrepresented the facts when, in requesting the first extension of time, it stated that additional time was needed because of the press of business in the United States Attorney's Office in Muskogee, Oklahoma. Petitioners point out that attorneys

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1990

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for the Department of Justice in Washington, D.C., rather than attorneys in the Eastern District of Oklahoma, prepared and filed the government's brief.

The record shows that when the United States Attorney's Office received a copy of the trial transcript in late January 1989, it sent a copy of that transcript to the Department of Justice in order to assist the Solicitor General in his decision whether to authorize further review. After a review of the record, the Solicitor General authorized an appeal and recommended that the briefing be handled by an attorney in the Criminal Division of the Department of Justice. The Solicitor General therefore asked the United States Attorney's Office to file a motion in the court of appeals for a second extension of time in order to give that attorney adequate time to prepare the government's brief. See Gov't Resp. to Appellees' Mot. to Dis. 5-7, *United States* v. *Dennison*, No. 88-2802 (10th Cir. filed June 15, 1989). Accordingly, the fact that an attorney in the Justice Department filed the government's brief is not at all inconsistent with representations made by the United States Attorney in connection with the first request for an extension of time. Moreover, since the government disclosed all of these facts to the court of appeals, that court was well aware of the circumstances surrounding the government's need for additional time.

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